

On January 20, 2011, this Court, comprised of the Honorable James A. Murray, the Honorable Michael P. Sherlock, and the Honorable William J. Sweet, acting as a special court pursuant to 25 *Del. C.* § 5717(a)¹ held a trial *de novo* in reference to a Landlord/Tenant Summary Possession petition filed by Jay Winik (hereinafter referred to as “the Plaintiff”), against Lorraine Lake (hereinafter referred to as “the Defendant”). For the following reasons the Court enters judgment in favor of the **Plaintiff**.

Factual and Procedural Background

The Plaintiff filed a Landlord/Tenant Summary Possession petition with Justice of the Peace Court No. 16 seeking possession, court costs, accrued rent, and post-judgment interest at the current legal rate. This action is based on the Defendant’s alleged failure to pay rent. Trial was held on December 22, 2010, and judgment was entered in favor of the Plaintiff.² Thereafter, the Defendant filed a timely appeal of the Court’s Order pursuant to 25 *Del. C.* § 5717(a). Trial *de novo* was scheduled for January 12, 2011; however, it was continued as a result of inclement weather. The matter was therefore rescheduled and proceeded to trial on January 20, 2011.

¹ 25 *Del. C.* § 5717(a). *Nonjury trials*. With regard to nonjury trials, a party aggrieved by the judgment rendered in such proceeding may request in writing, within 5 days after judgment, a trial *de novo* before a special court comprised of 3 justices of the peace other than the justice of the peace who presided at the trial, as appointed by the chief magistrate or a designee, which shall render final judgment, by majority vote. . . .

² *Winik v. Lake*, Del. J.P., C.A. No. JP16-10-005692, Wall, J. (Dec. 22, 2010).

Plaintiff's Testimony/Evidence

The Plaintiff testified he and the Defendant entered into a lease agreement for 40 Salerno Drive, Smyrna, DE on February 5, 2010 for monthly rent in the amount of \$1,100.00.³ Upon execution of this agreement, the Defendant paid \$1,100.00 for a security deposit; however, she did not take possession of the rental unit until February 18, 2010. The Plaintiff stated the delay in taking possession was the fault of the Defendant as she failed to pay the necessary fees to the Town of Smyrna to establish electrical service in her name. Shortly after taking possession, the Defendant fell behind in her rent, submitting only partial payments from March to June, and has not paid any rent since June 18, 2010.

Additionally, the Plaintiff testified that a five-day demand letter was sent to the Defendant on October 22, 2010, demanding a total sum of \$5,850.00 to be paid within five days for accrued rent. The Plaintiff mailed the demand letter via the United States Postal Service Certificate of Mailing.⁴ The Plaintiff asserts the amount demanded in the letter is \$650.00 less than he is actually owed. This lesser amount is the result of his attorney providing a credit to the Defendant for a greater amount than she had paid.

³ Plaintiff's Exhibit #1, Lease Agreement.

⁴ Plaintiff's Exhibit #2, Five-day Demand Letter with Certificate of Mailing attached.

The \$5,850.00 includes back rent and a late fee for \$55.00 for the month of March.

Under cross-examination, the Plaintiff testified that monthly rent payments were to be paid directly to his Wilmington Trust Bank account.⁵ He provided the Defendant with deposit slips and stated that the deposit slips were her receipts for paid rent. He testified that a total of three properties pay their rent into this account, and that he was able to tell who had paid their rent and who had failed to do so by the amount of each deposit. The Defendant inquired as to why she was never given a receipt other than a deposit slip, and the Plaintiff stated, "Because of the distance, this is the easiest way to get a receipt. . . . You never asked for a receipt."

Finally, the Plaintiff was asked if he had ever provided a Reservation of Rights Letter to the Defendant, to which he replied, "I don't know what a Reservation of Rights Letter is."

The Plaintiff's next witness was the Defendant. The Defendant concurred that she entered into a lease agreement with the Plaintiff and that she paid the security deposit of \$1,100.00 on February 5, 2010. Plaintiff also entered an email thread between himself and the Defendant as evidence,

⁵ Plaintiff's exhibit #1, states monthly rent payments should be sent to: Jay Winik 712 South Division Street, Salisbury, MD 21804.

without objection, which outlines an ongoing conversation about how and when rent payments were going to be made by the Defendant.⁶

Defendant's Testimony/Evidence

The Defendant testified that she was prevented from taking possession of the rental unit when she paid the first month's rent on February 12, 2010, due to no electrical service. She claims the Plaintiff failed to provide the Town of Smyrna with the proper documentation to allow her to establish electrical service in her name. She took possession of the rental unit on February 18, 2010.

The Defendant stated that the Plaintiff has filed a number of Landlord/Tenant Summary Possession petitions against her during her tenancy, which have been dismissed by the Plaintiff because her rent was paid in full. In support of her claim, she submitted two letters of dismissal.⁷

The Defendant asserts that she has paid all rent due through the end of September 2010; however, she does not have any receipts to support her claim, due to a fire that destroyed her records.

On cross-examination, the Defendant stated, "I paid part of the rent for October. . . . I paid all rent from February to September. . . . I did not pay

⁶ Plaintiff's Exhibit #3.

⁷ Defendant's Exhibit #1. (Both letters are marked collectively as one exhibit).

for November, December or January. . . . I never received a five-day letter for November or December.”

Rebuttal Testimony

The Plaintiff testified that the lease agreement was to begin on February 5, 2010, and he is entitled to a full month’s rent for the month of February. The failure of the Defendant to take possession of the rental unit until later in the month is her fault, due to her not having the money to have electrical service connected.

The Plaintiff contends that the Defendant owes rent for more than just the months of October, November, December, and January. He claims she has paid only the following amounts: \$1,100.00 security deposit, \$1,100.00 paid in February 2010, \$550.00 paid on March 19, 2010, \$605.00 paid on April 2, 2010, \$600.00 paid on April 16, 2010, \$400.00 paid on May 4, 2010, and \$200.00 paid on June 18, 2010. No other payments have been made since.

Discussion

The Plaintiff is seeking accrued rent, and has testified to same, but has failed to provide any written record of payments paid or missed by the Defendant. Plaintiff’s Exhibit #3 is an ongoing email conversation between the parties relating to rent, when rent is going to be paid, and how much is

due. It is clear by the Plaintiff's responses that he was unsure how much rent was due him during this conversation. The Plaintiff's accounting and receipt procedure is less than adequate. The Plaintiff asserts that he can verify which tenant pays rent each month by the amount each tenant deposits in his assigned Wilmington Trust Bank account.⁸ The Plaintiff states this is possible because each tenant's monthly rent is for a different amount. This system is flawed because if two or more tenants pay less than the full rent amount, the Plaintiff has no way of verifying which amount should be credited to which tenant.

The Court did not find the testimony of either party more or less credible than the other. Based on the evidence presented at trial, this Court finds that Plaintiff has failed to show by a preponderance of the evidence that he is due any accrued rent from February through September 30, 2010. However, this Court is satisfied, based on the Defendant's own admission,⁹ that she failed to pay rent for the months of October, November, and December 2010, as well as January 2011.¹⁰

⁸ Although the Defendant brought his bank statements to court, he did not attempt to admit them as exhibits at trial.

⁹ "A judicial admission is a formal statement by a party in the course of judicial proceedings, which removes an admitted fact from the field of controversy." *Pesta v. Warren*, 2004 WL 1172996, at *1 (Del. Super.).

¹⁰ The Defendant's testimony under cross-examination was, ". . . I did not pay for November, December, or January. . . I paid everything up to October."

Conclusion

Based on the Court's fact-finding inquiry, the Court's above-referenced conclusions of law and by a preponderance of evidence, the Court by unanimous verdict hereby enters ***JUDGMENT FOR THE PLAINTIFF.***

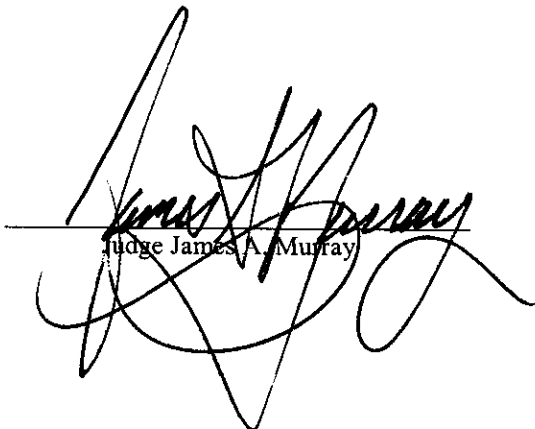
Judgment amount: **\$4945.40** (\$1,100.00 monthly rent x 4 = \$4,400.00 + 15 days @ \$36.36 = \$545.40).

Possession of rental unit: **40 Salerno Drive, Smyrna, De 19977.**

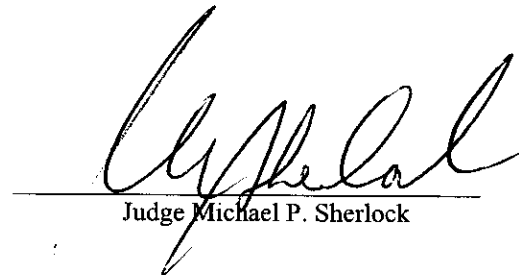
Per diem rent @ **\$36.36** until possession is relinquished.

Post-judgment interest @ **5.75%**.

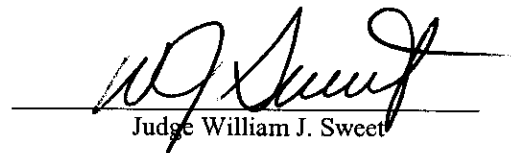
IT IS SO ORDERED, this 15th day of February, 2011.



Judge James A. Murray



Judge Michael P. Sherlock



Judge William J. Sweet